Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Provision of Interstate and	)	
International Interexchange	)	RM No. 8775
Telecommunications Service	)	
Via the "Internet" by Non-Tariffed,	)	
Uncertified Entities	)	

COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

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SUMMARY OF POSITION

ACTA's claim that Internet telephone software vendors are subject to regulation under Title II of the Communications Act is, simply put, preposterous. Title II regulation has historically been limited to the common carrier offering of basic transmission services and, contrary to ACTA's apparent belief, nothing in the Telecommunications Act of 1996 changed that framework. Indeed, the 1996 Act makes clear that telecommunications carriers are to be regulated under Title II only to the extent that they engage in the common carrier offering of basic telecommunications services.

Unlike telecommunications carriers, Internet telephone software vendors do not provide a telecommunications service. By ACTA's own admission, they offer "a computer software product." With respect to the Commission's Title II jurisdiction, software is very much like hardware. In this regard, the Commission has never regarded the provision of hardware in isolation from transmission services as an activity subject to Title II regulation. Thus, ACTA's claim that Internet telephone software should be regulated under Title II because it allows a computer "to be used as a long distance telephone" is without merit.

Equally unconvincing is ACTA's suggestion such regulation is justified in order to "maintain the status quo." Plainly, the Commission should not join ACTA in resisting inevitable and beneficial progress made possible by advances in information technology. Instead, the Commission should seek to promote new and innovative uses of information technology, whether that be through the Internet or otherwise. As experience has conclusively demonstrated, the best way to accomplish this goal is through the workings of a competitive, unregulated market for information technology products and services.

Like the rest of its petition, ACTA's suggestion that the Commission should assert jurisdiction over, and limit the use of, the Internet does not merit serious consideration. As the Commission has recognized, the "[e]xtension of regulation to cover or threaten to cover services . . . that have not been regulated can not be sustained in the absence of an overriding statutory purpose." There is no such purpose here. To the contrary, in the 1996 Act Congress declared that "[i]t is the policy of the United States . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." In light of this clear policy statement, the Commission should reject ACTA's invitation to assert jurisdiction and define the types of services that may be offered over the Internet.

To do otherwise would place a needless burden on the Commission's scarce resources. More specifically, it would require the Commission to pick and choose among rapidly evolving services and technologies. Given the deliberate pace of government policymaking and the rapid pace of technological change, the only purpose served by having the Commission act as a "gatekeeper" for the Internet would be to delay the introduction of important new services and technologies. Moreover, ITAA is not aware of any instances in which the Commission has engaged in such micromanagement of regulated networks and ACTA has not offered justification for doing so for the Internet.

ITAA urges the Commission to deny the relief requested by ACTA and reaffirm its commitment to the highly effective, deregulatory and pro-competitive policies that have allowed the Internet, in particular, and information technology, in general, to flourish.

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COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA"), by its attorneys, hereby submits the following comments in response to the Public Notice which the Commission issued in the above-captioned proceeding on March 8, 1996.[1] In the Notice, the Commission has requested comment on the petition filed by America's Carriers Telecommunication Association ("ACTA") relating to the use of Internet telephone software.[2]

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[1] See "Common Carrier Bureau Clarifies and Extends Request for Comment on ACTA Petition Relating to 'Internet Phone' Software and Hardware," FCC Public Notice, DA 96-414, Report No. CC 96-10 (Mar. 25, 1996); "Office of Public Affairs Reference Operations Division Petitions for Rulemaking Filed," FCC Public Notice, Report No. 2124 (Mar. 8, 1996).

[2] See America's Carriers Telecommunication Association Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking at 4 (filed Mar. 4, 1996) [hereinafter "ACTA Petition"].

I. IDENTIFICATION AND INTEREST OF ITAA

ITAA is the principal trade association of the Nation's information technology industries. Together with its twenty-five affiliated regional technology councils, ITAA represents more than 9,000 companies throughout the United States. ITAA's members provide the public with a wide variety of information products, software, and services. Accordingly, ITAA has a major interest in the issues raised by ACTA.

In its petition, ACTA has asserted that Internet telephone software vendors are acting as telecommunications carriers. For this reason, it has requested that the Commission: order computer software vendors to stop providing Internet telephone software unless they comply with Sections 203 and 214 of the Communications Act; issue a declaratory ruling asserting jurisdiction over interstate and international telecommunications services that use the Internet; and institute a rulemaking proceeding to define the types of telecommunications services that may be transmitted over the Internet. By way of justification, ACTA has asserted that such regulation is necessary to "maintain the status quo."

As an association whose member companies provide computer software, ITAA is unalterably opposed to the relief requested by ACTA. Unlike ACTA, ITAA believes that the public interest is best served by a competitive environment that promotes technological progress and innovation, and fosters the continued evolution of the Internet. ITAA therefore urges the Commission to deny the relief requested by ACTA and reaffirm its commitment to the highly effective, deregulatory and pro-competitive policies that have allowed the Internet, in particular, and information technology, in general, to flourish.

II. INTERNET TELEPHONE SOFTWARE VENDORS SHOULD NOT BE REGULATED AS TELECOMMUNICATIONS CARRIERS PURSUANT TO TITLE II OF THE COMMUNICATIONS ACT

ACTA's claim that Internet telephone software vendors are "telecommunications carriers" subject to regulation under Title II of the Act is, simply put, preposterous. Title II regulation has historically been limited to the common carrier offering of basic transmission services and, contrary to ACTA's apparent belief, nothing in the Telecommunications Act of 1996 (the "1996 Act") changed that framework.[3] By its terms, Section 3 of the 1996 Act provides that "a telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . . ."[4] "Telecommunications service" is defined as:

> the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.[5]

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[3] See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 60, § 3 (1996) [hereinafter "Telecommunications Act"]. If anything, the pro-competitive national policy framework established by the 1996 Act calls for further deregulation of the telecommunications industry. Towards this end, the Commission has recently proposed to adopt a "mandatory detariffing policy for domestic services of non-dominant interexchange carriers." See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 96-123, at ¶ 4 (rel. Mar. 25, 1996). Consistent with this proposal, the Commission should dismiss ACTA's suggestion that the tariffing requirements of Section 203 of the Communications Act, as amended, be applied to interstate services offered over the Internet.

[4] Telecommunications Act, 110 Stat. 60, § 3 (emphasis added). The House Conference Report similarly provides that a telecommunications carrier "shall be treated as a common carrier for purposes of the Communications Act, but only to the extent that it is engaged in providing 'telecommunications services.'" H.R. Rep. No. 104-458, 104th Cong., 1st Sess. 114 (1996).

[5] Telecommunications Act, 110 Stat. 60, § 3.

"Telecommunications," in turn, is defined by the 1996 Act as:

> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.[6]

These definitions thus codify the common law definition of common carrier communications[7] and the Commission's definition of basic service.[8] Taken together, these provisions make clear that telecommunications carriers are to be regulated under Title II only to the extent that they engage in the common carrier offering of basic telecommunications services.

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[6] Id.

[7] As explained by the U.S. Court of Appeals for the D.C. Circuit:

> An examination of the common law reveals that the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking "to carry for all people indifferently . . . ." This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users.

See National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976).

[8] A basic service is defined as "the common carrier offering of transmission capacity for the movement of information between two points" or as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 (1980) [hereinafter "Computer II"], on recon., 84 F.C.C.2d 50, 53 (1980), further recon., 88 F.C.C.2d 512 (1981), aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

Internet telephone software vendors plainly are not telecommunications carriers.[9] To begin with, Internet telephone software vendors do not provide a service, much less transmission capacity for the movement of "information of the user's choosing."[10] By ACTA's own admission, they offer "a computer software product."[11] For purposes of analyzing the scope of the Commission's Title II jurisdiction, software is very much like hardware. In this regard, the Commission has found that "equipment, by itself, is not a 'communication' service and thus is not required to be separately tariffed under Section 203" of the Communications Act.[12] "Indeed, the Commission has never regarded the provision of terminal equipment in isolation [from transmission services] as an activity subject to Title II regulation."[13] Thus, ACTA's argument that Internet telephone software must be regulated under Title II because it allows a computer "to be used as a long distance telephone" is totally without merit.[14]

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[9] If anything, Internet telephone software vendors are "access software providers," which the 1996 Act defines as providers "of software (including client or server software) or enabling tools that . . . transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." Telecommunications Act, 110 Stat. 139, § 509 (emphasis added). The 1996 Act further defines the term "access software" as "software (including client or server software) or enabling tools that do not create or provide the content but that allow a user to . . . transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content. Id., 110 Stat. 135, § 502.

[10] To the extent that the ability to send and receive voice communications over the Internet is being offered to Internet users as a service, the Commission may wish to conduct fact-specific inquiries to determine whether the providers of such service may properly be classified as "telecommunications carriers."

[11] See ACTA Petition at i.

[12] Computer II, 77 F.C.C.2d at 452.

[13] Id. at 451 (emphasis added).

[14] See ACTA Petition at i.

As the Commission has recognized, the "[e]xpansion of regulation to cover or threaten to cover . . . vendors that have not been regulated can not be sustained in the absence of an overriding statutory purpose."[15] ACTA has failed to identify any such purpose here. Instead, like a modern day Luddite,[16] ACTA has suggested that such regulation is necessary to "maintain the status quo." Plainly, the Commission should resist ACTA's invitation to become "a modern day King Canute seeking to hold back new technological waves."[17]

Advances in information technology have benefitted, and will continue to benefit, businesses and consumers alike. Rather than resisting progress and postponing the arrival of the Information Age in favor of "the status quo," the Commission should promote innovative uses of information technology, whether that be through the Internet or otherwise. As experience has conclusively demonstrated, the best way to accomplish this goal is through the workings of a competitive, unregulated market. ACTA's claim that heavy-handed Title II regulation of Internet telephone software vendors is somehow needed to preserve competition is directly at odds with the pro-competitive national policy framework established by the 1996 Act.[18]

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[15] Computer II, 77 F.C.C.2d at 434.

[16] In a doomed effort to stave off the Industrial Age, organized bands of British workers -- led by a disaffected worker named Ned Ludd -- systematically destroyed textile machinery that they viewed as a threat to the status quo at the turn of the nineteenth century. ACTA's stagnant reasoning suggests that the Information Age has spawned its own breed of Luddites determined to resist the progress made possible by advances in information technology. See Paul Sperry, "The New Luddites," Investor's Business Daily, Sep. 22, 1995, at A4.

[17] Public Utility Commission of Texas v. FCC, 886 F.2d 1325, 1335 n.10 (D.C. Cir. 1989).

[18] The regulatory approach embodied in ACTA's petition can best be characterized by former Commissioner Robinson's disdain for over-zealous regulation in the mid-1970s: (continued...)

ACTA also argues that regulation is necessary because the use of Internet telephone software is "detrimental to the health of the nation's telecommunications industry and the maintenance of the nation's telecommunications infrastructure."[19] In support of this claim, ACTA asserts that so-called Internet telephone calls are free. Even if this were true -- which it is not[20] -- it is entirely irrelevant to whether Internet telephone software is properly classified as a regulatable "telecommunications service."

In the past, the Commission has rejected claims that new and innovative uses of customer-premises equipment ("CPE") are "detrimental to the health of the nation's telecommunications industry." In doing so, the Commission has repeatedly recognized that consumers have the right to interconnect CPE to the network for any purpose that is "privately

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[18](...continued)
"if it moves, regulate it; if it doesn't move, kick it -- and when it moves, regulate it." See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261, 340-41 (1976) (Dissenting Statement of Commissioner Glen O. Robinson).

[19] ACTA Petition at 5.

[20] In order to take advantage of this technology, an individual first must own or purchase a modem, and a computer outfitted with a sound card, and a microphone and speakers (or headset). In addition, the individual must purchase the software as well as pay a monthly fee, whether flat-rate or usage-sensitive, to an Internet access provider.

Also contrary to ACTA's claims, Internet telephone software is not a substitute for telephone service. Owners of such software can only use it to communicate with other Internet users who have the necessary computer equipment and who own compatible software. In order to communicate by voice over the Internet, parties must also agree in advance to get on-line at a pre-arranged time. And once on-line, they must tolerate sound quality that is far inferior to that of telephone service. Moreover, there is often a lag time between when a word is spoken and when it is heard on the other end, and some versions of Internet telephone software are "half-duplex," meaning that they only allow one party to an Internet conversation to speak at a time.

beneficial without being publicly detrimental."[21] Computers with Internet telephone software do not pose a threat of harm to the network. Nor is there any reason to conclude that the use of such computers to send voice communications over the Internet is in any way improper.[22]

In addition to being inappropriate as a matter of law and policy, extending Title II regulation to computer software would "result in a regulatory quagmire necessitating numerous ad hoc determinations."[23] The Commission would inevitably be called upon to determine the regulatory classification of computer software based on the purpose for which the software is used. The Commission also would be required to make similar determinations with respect to CPE in which such software is installed. In the past, the Commission has rejected such an approach to regulation. As the Commission explained in Computer II:

> an arbitrary distinction between 'communications' and 'data processing' capabilities, functions, or uses in customer-premises equipment could impede a supplier's ability to refine and adapt its offerings to user requirements for the various combinations and permutations of computer processing applications often

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[21] See Hush-a-Phone v. FCC, 238 F.2d 266, 269 (D.C. Cir. 1956); Use of the Carterfone Device in Message Toll Tel. Service, 13 F.C.C.2d 420, recon. denied, 14 F.C.C.2d 571 (1968); Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989).

[22] Indeed, the Commission has long recognized that, due to advances in technology, "in providing a communications service, carriers no longer control the use to which the transmission medium is put. More and more the thrust is for carriers to provide bandwidth or data rate capacity adequate to accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile, or other forms of transmission." Computer II, 77 F.C.C.2d at 438. The use of computers to send and receive voice communications over the Internet is entirely consistent with this well-established trend.

[23] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 F.C.C.2d 358, 410 (1979).

> accomplished by simple 'software' or 'hardware' changes to existing equipment.[24]

In short, any attempt to draw artificial distinctions among types of computer software based on the purpose for which it is used would foster regulatory uncertainty and, as a result, discourage further innovation. It also "could consume a very significant proportion of the resources of this agency."[25]

III. THE COMMISSION SHOULD NOT ASSERT JURISDICTION OVER, OR LIMIT THE USE OF, THE INTERNET

Like the rest of its petition, ACTA's suggestion that the Commission should assert jurisdiction over, and limit the use of, the Internet does not merit serious consideration. As the Commission has recognized, "[t]he principal limitation upon, and guide for, the exercise of . . . [the] . . . powers which Congress has imparted to this agency is that Commission regulation must be directed at protecting or promoting a statutory purpose. In some instances, that means not regulating at all, especially if a problem does not exist."[26] Here, there is neither a statutory purpose nor a problem that would warrant regulating the Internet or limiting the services it can provide.

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[24] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 F.C.C.2d 358, 411 (1979). As the Commission also has recognized, "it is likely that any given classification scheme would serve to impose an artificial, uneconomic constraint on either the design of CPE or the use to which it is put . . . . We conclude that the regulatory process, carriers, unregulated equipment vendors, and the public would be better served if all CPE were accorded uniform regulatory treatment." Computer II, 77 F.C.C.2d at 438.

[25] Computer II, 77 F.C.C.2d at 434.

[26] Id. at 433.

Indeed, Congress has expressly recognized that the Internet has "flourished, to the benefit of all Americans, with a minimum of government regulation."[27] Accordingly, Congress has declared that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[28] In light of this clear policy statement, the Commission should reject ACTA's invitation to assert jurisdiction and regulate the Internet.[29] To do otherwise would impose a needless drain on the Commission's resources. The Internet is a network of interconnected public and private networks that use a standard set of protocols. To the extent that these networks are used in interstate communications, they are already regulated by the Commission. It thus would serve little, if any, purpose for the Commission to impose another layer of regulation on these networks.

Also without merit is ACTA's contention that the Commission should limit the use of the Internet because it is "finite." ITAA is not aware of any instances in which the Commission has engaged in such micromanagement of regulated networks and ACTA has not offered justification for doing so for the Internet. Moreover, if and when there is a need for additional bandwidth on the Internet, there is every reason to believe that the operators of the

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[27] Telecommunications Act, 110 Stat. 138, § 509 (emphasis added).

[28] Id. (emphasis added).

[29] Congress is not alone in recognizing that the Internet should remain free from regulation. To the contrary, in recent testimony before the House Subcommittee on Telecommunications and Finance, Commissioner Chong stated that the Internet has been a success because the "government has kept its mitts off." See "Fields Cautions FCC on Telecom Act Enforcement," Communications Daily, Mar. 28, 1996, at 2.

networks that comprise the Internet will increase transmission capacity without the Commission's prompting.

ACTA's suggestion that the Commission define the types of services that may be provided over the Internet is unworkable at best. Such an approach would require the Commission to pick and choose among rapidly evolving services and technologies. Given the deliberate pace of government policymaking and the rapid pace of technological change, the only purpose served by having the Commission act as a "gatekeeper" for the Internet would be to delay the introduction of important new services and technologies. Plainly, consumers, not the Commission, should choose the services best offered over the Internet.

The Commission therefore should deny ACTA's request that the Commission assert jurisdiction over the Internet and limit the types of services that it may be used to offer.

IV. CONCLUSION

For all of the reasons set forth above, the Commission should deny the relief requested by ACTA. Instead, the Commission should take advantage of the opportunity presented by this proceeding to reaffirm its commitment to the highly effective deregulatory and pro-competitive policies that have allowed the Internet, in particular, and information technology, in general, to flourish.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brian J. McHugh, hereby certify that a true and correct copy of the foregoing Comments of the Information Technology Association of America was sent by first class United States mail, postage prepaid, this eighth day of May, 1996, to counsel for America's Carriers Telecommunication Association, Charles H. Helein, Helein & Associates, P.C., 8180 Greensboro Drive, Suite 700, McLean, Virginia, 22102.

Brian McHugh

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